IN THE

Supreme Court of the United States.

October Term, 1918. No. 192.

CHESAPEAKE AND DELAWARE CANAL COMPANY,

Plaintiff in Error,

v.

THE UNITED STATES OF AMERICA,

Defendant in Error.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

SUPPLEMENTARY BRIEF IN BEHALF OF THE CHESAPEAKE AND DELAWARE CANAL COMPANY, PLAINTIFF IN ERROR.

In the argument in the Paper Book of the plaintiff in error, pages 54-56, the following question of law was considered, but not with that detail its importance demanded:

(A) Did not the defendant in error—the United States—come down, from its position of sovereignty and enter the domain of commerce, when it became, by *Act of Congress*, a stockholder in the private profit-sharing Chesapeake and Delaware Canal Company?

(B) If "A" be answered in the affirmative, then the United States is barred by the Statute of Limitations from bringing suit to recover dividends due and

unclaimed since some thirty-odd years ago, as a suit by an individual stockholder would be barred, under like circumstances.

(C) It is not obligatory that the bar of the Statute of Limitations must be specifically pleaded—the Court itself will, of its own initiative, interpose the bar of the Statute of Limitations where the question is: whether the right to enter suit is not barred by the statute.

Practically the entire argument in our Paper Book is taken up, with the consideration of the following fundamental questions:

(D) Is it not the Rule of the Law of Evidence, that, after twenty years, payment will be disputably presumed, which shifts to the plaintiff the burden of proof to establish non-payment?

(E) This Rule of Evidence applies to the Sovereign—the United States—as it applies to an individual. It has nothing to do with the Statute of Limitations, it is purely a Rule of Evidence, and, **as in the case of an individual, so, in the case of the United States, the longer the delay, the stronger must be the evidence of payment, for the reason that, the counter evidence of payment is rendered tremendously difficult by the delay of over thirty-odd years in presenting the claim.**

"D" and "E" present the questions considered in the main argument.

The question in "A", "B" and "C" is equally fundamental and can always be considered. It is of great importance, in that, it will lead necessarily, to the conclusion of the case—if it be found to be well taken. This question, in our opinion, after a very earnest reconsideration of our Paper Book, pages

54-56, has not there received the consideration its importance demands, therefore, we crave permission to file this short Supplementary Brief.

The following is the opinion of the trial Judge, upon this question—Transcript of Record, page 16 206 Fed. Reporter 964:

> "There is nothing in the declaration or bill of "particulars to indicate that . . . . . the "money sued for, *if recovered,* would not go into "the national treasury and form part of the pub-"lic funds to be devoted to public and not to pri-"vate purposes. It must be assumed, in the ab-"sence of an allegation to the contrary, that what-"ever moneys may be recovered in this action will "be paid into the treasury of the United States to "be disposed of as part of the public moneys. "Under these circumstances it is wholly imma-"terial that the United States became entitled to "the money, which, if recovered, is to go into the "national treasury, through its ownership of stock "of the defendant company or through an invest-"ment in any other form for its benefit. The "United States in so suing for the recovery of "money for the national treasury is proceeding in "its sovereign capacity and cannot be defeated by "a State Statute of Limitations."

"lic funds to be devoted to public and not pri-
"the money which, if recovered, is to go into the

The Circuit Court of Appeals, in reversing the District Court, 223 Federal Reporter 926, said, page 927:

> "the Company, contending that the govern-"ment abdicated its sovereignty by acquiring stock "in a commercial corporation and should, there-"fore, be treated merely as a private shareholder, "who would of course *be barred by the statute* . . . "the fallacy of the company's argument seems to "lurk in the assumption that in this action, the "government is asserting a right in its character "as a stockholder. ***Undoubtedly the right came*** "into being because the government owns the

> "stock, but in no other respect has the suit any-
> "thing to do with such ownership. *The govern-*
> "*ment is not suing as a stockholder; it is suing as*
> "*a creditor,* and in this character alone, it is now
> "to be considered. The right set up is a right to
> "recover a sum of money from the company; and
> "could be urged quite as effectively ***by an assignee***
> "*of the dividends,* although he might never have
> "been a stockholder at all."

That is, both these courts below held: The United States is acting in its sovereign capacity in recovering these dividends, because, *when recovered,* they will go into the public treasury for public use. *There is no decision in this court to this effect, or, in any other court of last resort, we have been able to find.* We do not believe such a decision has ever been made in any substantial court, for, it is so manifestly wrong—the United States, as a *stockholder* in a business corporation to possess equity rights in the corporate funds superior to the equity rights of its co-equal stockholders. The lower courts have completely ignored the facts stated by Chief Justice Marshall, in *U. S. Bank v. Planters' Bank,* 9 Wheat. 904, on page 908.

> "The Government, by becoming a corporator,
> "lays down its sovereignty, so far as respects the
> "transactions of the corporation, and exercises no
> "power or privilege which is not derived from
> "the charter."

Moreover, the contention of the courts below is not sound, for this reason, all dividends of all stockholders, if paid in fraud of creditors, can be pursued by the creditors, hence if the dividends received by the stockholder—the United States—are exempted from this obligation, then, this would place on the other stockholders an inequality which the United States agreed to share, when it became—*not* a sovereign stockholder, but—an individual stockholder.

There is not such a thing as a sovereign stockholder in a private corporation for profits. And besides, the United States became a stockholder in this business corporation, *by virtue of an Act of Congress.* The Act of Congress permitted them to become an *individual* member of a private corporation for profit.

What we have just said leads to the consideration of two *preliminary* questions (a) The true nature of a corporation, and (b) the nature of a dividend.

(a) The existence of a corporation independent of its shareholders is a *fiction,* because the rights and duties of the persons who compose it are not those of an imaginary being and, therefore, the contract by which the corporation is formed is a contract, between its stockholders, and a mutual agreement between them for their mutual benefit, so, any shareholder can hold any other shareholder to a performance of his contract, and every stockholder is subject to the liabilities of all the stockholders—every share is equal to every other share and no special privileges or advantage can be given to any shareholder, for the reason, that any discrimination in favor of a particular stockholder will be made at the expense of the others. Every stockholder has the right to demand that all stockholders who have enjoyed the privileges of stockholders—for instance, dividends and profits, must also bear the burdens which may attach to these dividends and profits. Stockholders have equal rights and must bear equal burdens.

The above principles, briefly condensed, from Morawitz on Corporations seem conclusive—how is it possible that a stockholder can sue for a dividend some thirty-odd years after it is due, when all accounts have been lost, the corporate books balanced many years ago and the burden of paying the dividends to this individual stockholder—the United States—will

fall upon the assets, the joint property of all the stockholders, as will be made clear, in a moment, when we consider "b"—the nature of a "dividend."

The error in the Circuit Court of Appeals is this: Whilst the Court acknowledges: "Undoubtedly the right (to the dividends) came into being because the Government owns the stock," the Court proceeds: "The Government is not suing as a stockholder, it is suing as a creditor, alone." Why? Because the money, *when recovered,* will be placed in the public treasury, for the public use. This cannot be the law, of course, *after* the recovery, the money is the money of the United States, but *prior* to the recovery it is a *dividend,* due the stockholder—the United States, and must be recovered precisely as all the other individual stockholders recover their dividends.

(1) The well-recognized principle of the *Planters Bank Case,* supra: "The United States, in entering a private business loses her sovereignty and descends to the position of a private individual," indisputably establishes, that in the principal case, the United States took on this individualistic character, *by virtue of an Express Act of Congress.*

(2) And of that other well-recognized principle, just stated, that stockholders in a private corporation have mutual rights and mutual burdens, because of the contract of membership. These mutual rights and mutual burdens are not those of that imaginary *fiction* —the corporate entity, but of the individuals composing that entity.

(3) And furthermore, in *United States v. Nashville,* etc., 118 U. S. 120, 125, this court examined the facts with the minutest care in order to find out how the money sued for was employed: whether it was (1)

Government money arising out of a public right or a public interest, or (2) Government money arising out of its employment in a private enterprise, in which the Government was taking part. In "1" the Government would be suing in its sovereign capacity, but in "2" it would be suing as an individual as in Cooke v. The United States, 91 U. S. 389, 398.

(b) The nature of a "dividend," "stock" and "dividend" are practically the same thing—"a dividend is a portion of the principal or profits, divided among the several owners of a thing." In Wood v. Drummer, 3 Mason 308, Mr. Justice Story speaks of a "dividend" as a *portion* of the capital stock. Stockholders' rights are: the residuum after payment of debts, which may be turned over from time to time as dividends." A "share" is a right to partake according to the amount of the party's subscription in the surplus profits obtained from the use of the joint capital stock." By "bank stock" is meant: an individual interest in "dividends" as they are declared and a right to a *pro rata* distribution of the effects of the bank at the expiration of the charter." The corporate capital stock is the undivided equitable assets of the corporation, held in trust by the body corporate, (1), for the creditors and (2), the residuum for the stockholders, whose *pro rata* share therein, is represented by a certificate of shares and which dividend comes to the stockholders in profits, from time to time, in the shape of "dividends," and then, at dissolution "dividends" of the residuum, after payment of debts.

From the above analysis of a "dividend" it is idle to contend that the individual private stockholder, the United States, has any higher rights upon the corporate funds than the other private individual stockholders—all associated together as private stockholders, in a private profit-sharing business corporation. If the contrary be true, as held by the courts below,

then, **one stockholder has superior rights in the jointly owned fund, because the dividends claimed have entirely disappeared after the delay of some thirty odd years, and if they are paid now, the money to pay them must be taken out of the corporate assets, which, positively belong to all the stockholders alike.**

The decision of the court below must be accepted and must be predicated upon the following facts; *which facts, however, cannot lead to the said decision:*

The United States were authorized, *by a specific Act of Congress,* to become a stockholder in a private corporation for profit. This Congressional authority really meant—according to the repeated decisions of this court—that the Congress authorized the United States "to come down from its position of sovereignty and to enter the domain of commerce," in associating with its fellow stockholders, sharing in the mutual benefits and the mutual burdens of the joint association.

Upon the above facts the courts below held: "In suing for its dividend the United States was acting in its sovereign capacity," and the courts so held, for this one single reason, only: the "dividends," when recovered, will go into the public treasury for the public use.

In suing on a promissory note, the money if recovered, will go into the public treasury, of course, but that fact does not relieve the United States from complying with the *law merchant,* which binds all individuals. *U. S. v. Baker,* 12 Wheat. 559. However, there is no possible doubt of the correctness of the Court's statement *but,* it is dependent upon the fact—the court so states—"the dividends," *when recovered,* etc., etc." That the dividends become public money *when recovered,* of course, does not admit of the slightest doubt, as said in *Van Brockline v. Tennessee,* 117 U. S. 151, by Mr. Justice Gray, page 158: "The United

"States do not and can not hold property as a monarch "may, for private or personal purposes. All the prop-"erty and revenues of the United States must be held "and applied, as all taxes, duties, imports and excises "must be laid and collected, to pay the debts and pro-"vide for the common defence and general welfare of "the United States." Please note, Mr. Justice Gray says the United States holds property for the common defence and general welfare of the United States. But it is a very different question, whether, in the act of recovering the dividends, the United States is not bound by the same rule which applies to its fellow stockholders. It is difficult to see why this is not the case, for the dividend was declared for all individual stockholders, and as the dividend of the individual United States stockholder has been lost, if recovered, **it must be paid out of assets, which at this very moment belong to all the stockholders, and why should they be called upon to pay a second dividend to a fellow stockholder when this stockholder could not be called upon to pay his share of a (second) dividend to a fellow stockholder, because his demand would be barred by the Statute of Limitations.** The equal burdens, all stockholders have contracted to bear, can be satisfied only by applying the Statute of Limitations alike to all claims for stale dividends.

We have made the most thorough search of the decisions of this court, and we have not been able to find one case or even a Rule of Law or a principle announced in this court, which would affirm the decision of the court below.

In order to present the case clearly, we shall refer to a few decisions: *United States v. Nashville Ry. Co.*, 118 U. S. 120, 125 (1885) is distinguishable. This court held the United States sued in its sovereign capacity.

Of course, this case is the law, but it is so clearly sound that he who runs may read how correct is the decision. The court went into the market and bought coupon bonds and held these bonds, under an agreement, in trust, for the Chickasaw Indians. The money with which the bonds were purchased came from the sale of the land of the Indians. Mr. Justice Gray, page 126, said:

> "Those lands, the money received from their sale, and the securities in which that money was invested, were held by the United States, in trust, to be applied for the benefit of those Indians, in performance of the obligation assumed by the United States by treaties with them. The securities were thus held by the United States for a public use in the highest sense, . . . and they continued to be so held until that obligation had been performed and discharged, . . ."

After the obligations of the trust had been carried out the bonds came into the possession of the United States of their own right. Mr. Justice Gray continues:

> "after which they (the bonds) were held by the United States like all other property of the government, for the ordinary public uses. *Van Brockline v. Tennessee*, 117 U. S. 151, 158."

The distinction between this (a) *Nashville Ry. Co.* case an) the principal case, is perfectly clear. In "a" the United States were suing for the recovery of United States money invested in railway bonds, but, with the railway, *itself*, or with its stockholders, the United States had no sort of relations—at no moment was the United States in any way associated with the railway—its profits and its losses were not of the slightest interest to the United States, so that the Railway paid the interest on its bonds owned by the Government. The United States did not owe the railway or any of its stockholders one single obligation—in fact,

all its interests were antagonistic to those of the railroad and its stockholders. In (b) however, the principal case, all the obligations of the United States are exactly the converse of all they were in "a."

In *United States v. Beebe*, 127 U. S. 338 (1887), and in *United States v. Insley*, 130 U. S. 263 (1889), the United States were acting in their sovereign capacity, and *United States v. Nashville, etc., Ry. Co., supra*, was followed. In the *Beebe case*, however, Mr. Justice Lamar held the United States could not be made the plaintiff in order to get the benefit of the Statute of Limitations, when the whole interest belonged to others, as Mr. Justice Lamar said: "Mr. Justice Gray was careful to say this in the *Nashville* case, supra."

It is not necessary to cite more cases, for it is perfectly clear and no one doubts it, that the United States is suing in its sovereign capacity when it is suing for the recovery of its money in corporate securities, which securities do not give the United States the slightest interest in the corporate affairs or which securities do not in any way lessen the sovereignty of the United States, but, contra, an entirely different question is presented when the United States' money has been invested by virtue of a specific Act of Congress, in stock or a business corporation for profit. And, furthermore, it is not the fact that the money, *when recovered*, will go into the public treasury for public use, which determines the character in which the United States is suing, but rather, how the money is invested, is the determining factor—if the money is invested directly in commercial pursuits, of if the money is used to purchase stock in a commercial company—making the United States a stockholder in such company, then the rights and liabilities are burdens of the United States which are quite the same, in every regard, as those of the United States' private individual fellow stockholders.

Cooke v. United States, 91 U. S. 389, 398 (1875), is decisive; the fact that the money will go into the public treasury, when recovered, makes the stockholder—the United States *after* its recovery a sovereign, but *before* its recovery, when suing for the dividend, it is acting as a private individual, not in a sovereign capacity. The contention of the court below, we cannot find, has ever been made, or so decided, by a court of last resort. Not one of the promissory note cases cited by Chief Justice Waite, in the Cooke Case, maintain it, and in any case, of course, the United States' money, when recovered, becomes public money, but *until* recovered, it must be burdened with all liability of the money of every fellow stockholder of the United States. Chief Justice Waite said, page 396, and on this point the dissent of Justices Clifford, Field and Bradley is not founded:

> "It was conceded in the argument, that when the United States become parties to commercial paper, they incur all the responsibility of private persons under the same circumstances. This is in accordance with the decisions of this court."

Upon this point, this *Cooke* case remains the law today. It has constantly been referred to by this court, and upon this point not even questioned. As the Chief Justice said: "This is in accordance with the decision of the court," and the Chief Justice then cites a very early decision to this effect, for instance: United States v. Barker, 12 Wheaton 559. Perhaps it should be stated that at first blush it may seem as if this court did not approve of this Cooke case, in the opinion of Mr. Justice Gray in *District of Columbia v. Cornell*, 130 U. S. 655 (1889). Mr. Justice Gray explains *Cooke v. United States* to distinguish it and he then states: "We are not prepared to extend the scope of that decision." But, by these words, Justice Gray, is referring to the fraud

in the Cooke case, which he had been considering in the previous paragraph.

In *National Bank v. United States*, 151 Fed. Rep. 402 (1907), Judge Putnam, page 407, cites *Cooke* v. *United States, supra,* as holding: "in the event officers of the United States are authorized, by statute, to issue what is in form commercial paper, and do issue it, the relations of the United States thereto are the same as those of individuals," so too, we add, the United States when authorized by Act of Congress, to become stockholders in a private corporation for profits, the relations of the stockholder—the United States, to its fellow stockholders are the same as those of individuals. District Judge Aldrich was in dissent, page 409, not thinking that pension checks or warrants should be treated as relating to a commercial transaction, in respect to which the Government comes down from its position of sovereignty and enters the domain of commerce, but approving of *Cooke v. United States,* supra. When this case came before the Supreme Court on appeal, *United States v. National Exchange Bank,* 214 U. S. 301 (1909), this court followed the dissenting opinion of District Judge Aldrich just referred to, agreeing with him that the United States should recover, distinguishing the *Cooke* Case, but not in any way questioning it, insofar as regards the law that, in commercial transactions the United States comes down from its position of sovereignty and enters the domain of commerce.

The money to pay these dividends was originally taken out of the assets, which belonged, jointly, to all the stockholders. If the United States can recover payment of these lost dividends, after thirty odd years delay in bringing suit, then the money to make payment will have to be taken, a *second time* out of these jointly owned assets, now owned, probably, by entirely different stockholders, thus, an injustice will be perpetrated

by the stockholder the United States upon its fellow stockholders, for, they will have to contribute a *second* time in order to pay the United States after thirty odd years of delay in bringing suit.

A "dividend" declared in a debt—a debt due a stockholder—due every stockholder. But it is a debt burdened with certain obligations—alike applicable to every stockholder. This last statement becomes perfectly clear from the following: If a dividend is declared and paid, in fraud of creditors, it does not make the slightest difference, roughly speaking, whether the dividends belong to the individual stockholder—the United States—or to any other individual stockholder; in either event, creditors, or the remaining fellow stockholders can follow the money, paid as dividends, and recover it, to help to make up the necessary amount—its proportionate share of the fund needed to pay the corporate creditor—each stockholder has the right to call upon every one of his fellow stockholders to contribute to the amount needed to pay the corporate debt. This point has nothing to do with this question: Whether the individual shareholder—the United States, has deposited their dividend, *after* it has been received, in the public treasury. Our only purpose here is to draw attention to this fact: Any stockholder to whom a dividend has been paid (it is not of the slightest importance if that stockholder happens to be the United States, for in this case the United States is a stockholder in a corporation for profit, by virtue of a special authoritative Act of Congress) cannot escape the obligations which are attached to his dividend, even though, *after* its recovery, the money has been turned into the public treasury. This fact is not of the slightest deterrent force, for each stockholder, including the United States, owes a duty to the corporate creditors and also to his fellow stockholders to contribute its

share to pay these creditors, and thereby, lessen the shares, which these co-stockholders would, otherwise, have to pay.

A fact of conspicuous significance presents itself, in connection with what we said in the last paragraph, in favor of the above contention of the plaintiff in error: There is no decision of this court, or of any court of last resort, we can find, wherein the sovereign is not acting as an individual, in its membership, as a stockholder in a commercial corporation for profit, *by virtue of a special Act of Congress,* just as all the individual stockholders are acting, with precisely the same rights and the same obligations towards each other; *for instance,* it is the decision of this court, that when the United States became a stockholder in a business corporation it did not confer upon that corporation or upon its *alter ego*—its fellow corporate stockholders, the exemption of the sovereignty of the United States. On the contrary, the United States descended to the position of its co-stockholders. How is it possible, when the United States thus descends, that it can escape the burdens which fall alike upon all the stockholders, and how can a dividend be due them, free of the obligations which burden the dividend of every other stockholder?

If a sovereignty has given its permission to be sued, then this right of action existing, it follows, that corporate creditors or stockholders can sue a fellow stockholder for his proportionate share of his dividend, received in fraud of creditors, even though this stockholder is the United States, whose dividend, upon its receipt, was deposited in the public treasury, for the public use. *Curran v. State of Arkansas,* 15 How. 304; *Ward v. Dummer,* 3 Mason (U. S.) 308, and *Main v. Mills,* 6 Biss (U. S.) 98.

A dividend is a chose in action—it must be demanded, and, if it is not demanded for over thirty-odd

years, and there is no part of that dividend fund remaining in the corporate treasury, then it can be paid only out of the assets, jointly owned by all the stockholders and this is the result: This delay of thirty-odd years of one stockholder, in demanding his dividend, will place upon his fellow stockholders the burden of raising funds a second time—this time, out of the mutually owned corporate assets, thereby lessening their own profits in any dividend subsequently declared. This contention is absolutely untenable.

> "Dividends are payable out of profits or earn-
> "ings, hence, a corporation cannot pay them from
> "the capital, leaving insufficient assets to pay the
> "corporate debts, without committing a fraud
> "upon the corporate creditors",

and, as stated by the Court in numerous cases, when stockholders are so paid, the fund can be followed and recovered.

The Cyclopaedia of Law, in considering "dividends", says:

> "Statutes of Limitations run against the gov-
> "ernment in ordinary trade relations, when the
> "government divests itself of its attributes of sov-
> "ereignty and enters into ordinary trade rela-
> "tions, the government loses its immunity from
> "the statute and is governed by the same limita-
> "tions as an individual under like circumstances."

Surely, the government stockholder in a commercial corporation cannot escape its own responsibilities, by placing extra burdens on its fellow stockholders.

It may be said, speaking roughly, that a corporation may "set off" the debts of stockholders on dividends, whether dividends are regarded (1) as a debt due from the corporation to its stockholders, or (2) as so much money in the possession of the corporation be-

longing to the stockkholder. Surely such money cannot be recovered, *after* a delay of over thirty-odd years in demanding it.

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